U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Tel (202) 565-5330 FAX (202) 565-5325

DATE: August 27, 1999
CASE NO.: 1996-INA-0287

In the Matter of:

LEO'S PIZZARIA
Employer

On Behalf Of:

MOHAMMED SUFIUR RAHMAN
Alien

Appearance: Mohamed Alamgir, Esq.
For the Employer/Alien

Certifying Officer: Richard Panati, Region III

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On January 24, 1995, Leo's Pizzaria ("Employer") filed an application for labor certification to enable Mohammed Sufiur Rahman ("Alien") to fill the position of Specialty Cook (AF 35-38). The job duties for the position are:

> Duties involve cooking Mexican, Italian and American food, entrees, sandwiches, subs, salads and desserts. Preparing different types of pizzas, and week-day and week-end specials.

The requirements for the position are two years experience in the related occupation of Cook.

The CO issued a Notice of Findings on October 25, 1995 (AF 26-28), finding that the position should be reclassified as a "Cook, Specialty" 313.361-026 with an SVP of six months up to and including one year. The CO proposed to deny certification on the grounds that the Employer's requirement of two years related experience was unduly restrictive in violation of 20 C.F.R. §§ 656.21(b)(2). Accordingly, the Employer was notified that it had until November 29, 1995 to rebut the findings or remedy the defects.

In its rebuttal, dated November 20, 1995 (AF 19-25), the Employer contended that the requirement of two years experience arises from a business necessity because the position is for a Cook, Specialty, Foreign Food 313.361-030, and it is a small business in a very competitive area where customers expect the best quality food, and the employer "must hire the best of employees i.e. a specialty cook." The employer further stated that the menu does include foreign food "included in the menu like different types of pizzas, in the entrees, lasagna, spaghetti, different styles of chicken." The employer stated "a person with less than two years experience is unable to handle daily situations arising in a restaurant efficiently," and that the employer had received "numerous complaints from customers" when it hired cooks with less than two years experience in the past, and it "cannot afford to hire a person with less than two years experience and waste time training a cook." Employer provided a "list of items to be added to the present menu," which included Italian items and Mexican items.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued the Final Determination on February 15, 1996 (AF 13-16), denying certification because the Employer failed to adequately document that the position was that of a Cook, Specialty, Foreign Foods requiring two years experience and remained in violation of section 656.21(b)(2). The CO determined that the menu listed limited, easily prepared entrees such as "spaghetti and meatballs, spaghetti with sausage, . . . , " and there is no comparison with these dishes and those listed in the *Dictionary of Occupational Titles* from a "Cook, Specialty, Foreign Foods." Moreover, the CO found the Employer failed to document its assertions that cooks hired with less than two years experience were troublesome, or that the requirement of two years is a business necessity, or that an individual with 6 months to one year of experience education or training could not perform the duties outlined in the application.

On March 25, 1996, the Employer requested review of the denial of labor certification (AF 1-12). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.,* 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

In this case, the CO correctly found that the Employer's requirement of two years experience was excessive for the position of Cook, Specialty. See *Dictionary of Occupational Titles* at 313.361-026. The CO notified the Employer that this finding could be rebutted by establishing that the job requirement arises from a business necessity: i.e., (1) bears a reasonable relationship to the occupation in the context of the Employer's business; and, (2) is essential to perform the job in a reasonable manner. See *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*); § 656.21(b)(2).

In rebuttal, the Employer provides a letter with a number of unsupported assertions regarding why two years of experience is necessary, and offers a list of "items to be added to the menu" in an effort to justify its requirements. Clearly, the Employer's rebuttal responds to the NOF in vague and unsupported assertions, which are insufficient to demonstrate business necessity. See *Inter-World Immigration Service*, 88-INA-490 (Sept. 1, 1989); *Tri-P's Corp.*, 88-INA-686 (Feb. 17, 1989). Likewise, while the Employer argues that two years of experience would be a convenience for the Employer in terms of training, its statements do not demonstrate that the requirement is business necessity or that the core job duties could not be performed by an individual with six months to one year of experience. See *Robert L.Lippert Theatres*, 88-INA-433 (May 30, 1990) (*en banc*). Finally, the Employer's rebuttal does not show that the

requirement bears a reasonable relationship to the occupation, or that it is essential to perform the job in a reasonable manner. The job duties of cooking spaghetti, burritos, or chicken does not establish that the position is that of Specialty Cook, Foreign Foods, which requires two years experience. Failure to address a deficiency noted in the NOF supports a denial of labor certification. *Belha Corp.*, 88-INA-24 (May 5, 1989) (*en banc*); *Reliable Mortgage Consultants*, 92-INA-321 (Aug. 4, 1993); *Mr. and Mrs Mohammad Yusuf*, 93-INA-334 (Jul. 22, 1994).

Based upon the foregoing, we find that the Employer has not adequately documented that its requirement of two years is a business necessity, or that the position is that of a Cook, Specialty Foreign Foods, which requires two years experience. The CO's denial of certification was, therefore, proper.

Order

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.